The next question is whether in view of the non-disclosure of these material facts I ought to allow the injunction to continue. On this question I find of great assistance the decision of Grimberg JC in *Mohamed Said bin Ali & Ors* v *Ka Wah Bank*,[1] which was cited by counsel for the plaintiff. In that case, there was a failure on the part of the first plaintiff to make full and frank disclosure of material facts in his affidavit that led to the granting of the ex parte injunction. Nevertheless, the learned judge, after considering several recent cases in England on the subject, came to the conclusion that he had the power in his discretion to continue the injunction, if that was the course which justice required, and in the circumstances of that case, he did exercise his power and continue the injunction in favour of the first plaintiff. It is unnecessary for me to refer to the cases which have been cited to and considered by the learned judge; suffice here to say that I have also considered them and found them helpful and instructive, and I agree with his analysis of those cases and the conclusion he reached. Accordingly, in my opinion, I have a discretion in this case to continue the interim injunction, notwithstanding the non-disclosure of the material facts by the plaintiff at the ex parte application. The defendant has resorted to extra-legal methods to gain possession of the premises and oust the plaintiff therefrom, and if the injunction is not continued the defendant would be enabled to perpetuate her wrongful act; furthermore, if the plaintiff at the trial succeeds in establishing his claim, it may be difficult at that stage to grant him the appropriate relief sought. For these reasons and also the reasons which I have earlier discussed, justice requires an order to continue the interim injunction to preserve the status quo. I accordingly made the order.

Application allowed.

Solicitors: *Lee Bon Leong & Co; M Dass & Co.*

Reported by *Azra Moiz*

Soon Hua Seng Co Ltd & Ors v Bombay Trading Co (Pte) Ltd

HIGH COURT (SINGAPORE) — SUIT NO 749 OF 1989
CHAN SEK KEONG J
16 APRIL 1990

Contract — Sale of goods — Free on board — Ship nominated by buyer unable to load all goods — Whether buyer in breach — Sellers load partial consignment — Claim for damages, full commercial invoice value and quantum valebat

By an agreement, the plaintiffs agreed to sell to the defendants a consignment of rice FOB and stowed Bangkok and Kohshichang, payment by irrevocable letter of credit payable at sight. The letter of credit was backed by a master letter of credit issued by an Iranian bank. When the plaintiffs appropriated rice to the contract, it was discovered that the vessel nominated by the defendants was not able to receive the entire consignment. The plaintiffs made a partial shipment on board the nominated ship instead. However, when the shipping documents were presented, they were not accepted by the bank on the grounds of discrepancies. The plaintiffs commenced the present action against the defendants for the price of the goods, damages for breach of contract and, alternatively quantum valebat. They then applied for summary judgment. The assistant registrar gave judgment for the plaintiffs. From this, the defendants appealed. The plaintiffs alleged, inter alia, that the defendants had waived the discrepancy.

Held, dismissing the defendants' appeal:

(1) In an FOB contract, the buyer has a duty to provide a vessel at the appointed time and place to enable the seller to bring the goods alongside for loading. The ship must be ready, willing and able to load the contracted goods.

(2) The defendants were in breach of contract in failing to nominate a vessel which could load the contracted goods.

(3) The plaintiffs could have refused to ship the entire cargo. They decided to ship what was already loaded on the ship and to regularize the discrepancy in the shipment by asking for the master letter of credit to be amended.

(4) If the defendants did not accept this shipment as due performance, they themselves would be in breach. If they accepted the partial shipment, they were liable to pay the full commercial value.

(5) The plaintiffs' claim against the defendants must succeed on either one or the other of the said causes of action. On either claim, the loss suffered by the plaintiffs is the same.

(6) As regards the second issue as to whether the defendants had waived the tender of documents out of time, it is an issue of fact which cannot be determined in these proceedings.

Belinda Ang for the plaintiffs.
S Bala for the defendants.

Cur Adv Vult

Chan Sek Keong J: By an agreement contained in a telex dated 30 November 1988 and amended by telexes dated 27 December 1988 and 28 December 1988, the plaintiffs agreed to sell and the defendants agreed to buy 15,000 metric tons 5% more or less at buyers' option Thai White

long grain milled rice 100% Grade 'B' of new crop at the price of US$283.50 per metric ton FOB and stowed Bangkok and Kohshichang, payment by irrevocable letter of credit payable at sight. The said letter of credit ('the HB L/C') was opened by the Singapore branch of the Habib Bank on 8 December 1988.

The HB L/C was backed by a master letter of credit ('the BM L/C') expiring on 12 March 1989 issued in favour of the defendants by Bank Markazi, an Iranian bank, for the account of the Government Trading Corporation of Iran ('GTC') who were the sub-purchasers of the said shipment of rice.

In pursuance of the contract, the plaintiffs appropriated to the said contract 14,250 metric tons of rice of the said specification ('the said goods') but the vessel nominated by the defendants, viz the Iran Borhan, was not able to receive the entire shipment of 14,250 metric tons. Accordingly, the plaintiffs delivered 13,390 metric tons of the said rice ('the said goods') packed in 279,000 bags on board the Iran Borhan on or about 6 February 1989 for delivery to the defendants or their order in Iran.

On 8 February 1989, the plaintiffs informed the defendants of the said shipment and because the quantity shipped was outside the lower tolerance of 5%, they requested the plaintiffs to amend the terms of the HB L/C accordingly. It would appear that the defendants then requested GTC to amend the BM L/C but received no response to the request.

On 22 February 1989, the defendants requested the plaintiffs to send the complete set of negotiable documents to Habib Bank, Singapore which the plaintiffs did on or about 28 February 1989. It would appear that Habib Bank then retained the documents without payment to the plaintiffs, but it is not clear on what basis Habib Bank was holding the documents. On 3 March 1989 and 6 March 1989, the plaintiffs inquired of the defendants about payment on their shipping documents but were unable to receive any satisfaction. On 8 March 1989, the parties communicated with each other as follows:

(a) the defendants suggested that the plaintiffs release unconditionally the shipping documents, free of charge, so that Habib Bank could send the documents to Iran for payment;
(b) the plaintiffs replied that they would do so only if the defendants confirm that they would pay the full commercial invoice value of the said goods;
(c) the defendants in turn rejected the plaintiffs' condition and warned the plaintiffs that their documents would be of no value to the defendants after 10 March 1989; they also informed the plaintiffs that the consignees had taken custody of the said goods;
(d) the plaintiffs counter-suggested that the representatives of both parties should fly together to Teheran and present the documents to GTC for payment;
(e) the defendants replied that the plaintiffs' proposal was useless as GTC had informed them that they would only accept the documents if presented through the bank, but that the defendants had no objection if the plaintiffs themselves were to present the documents.

On 17 March 1989, the defendants informed the plaintiffs that in view of the rejection of their proposal, they had advised their bankers (Habib Bank) that the plaintiffs' 'discrepant' documents were rejected and placed at the risk and disposal of the plaintiffs. On 18 March 1989, Habib Bank informed the plaintiffs' bankers, Bangkok Bank, that the documents which they here holding (purportedly on a collection basis) had not been accepted by the defendants due to three discrepancies.

On 18 April 1989, the plaintiffs commenced this action against the defendants for the price of US$3,954,825 being the price of the said goods, damages for breach of contract and, alternatively the sum of US$3,965,825 as upon a quantum valebat. The statement of claim was filed on 4 May 1989 and on 5 May 1989 the plaintiffs applied for summary judgment.

On 23 May 1989, the plaintiffs entered into an agreement with GTC whereby they purported to 'sell' the said goods to GTC as the defendants were unable to deliver the documents of title to the said goods to GTC. The price agreed was US$270 per net metric ton totalling US$3,766,500 less US$10,400 being the balance due for freight to the owners of the Iran Borhan, payment to be made under the BM L/C. The said agreement also provided that the 'sale' was without prejudice to GTC's as well as the plaintiffs' rights against the defendants under their respective contracts.

On the evidence, the defendants were aware either of the 'sale' of the said goods to GTC or of GTC's intention to settle the claim of the plaintiffs for the said goods wrongfully taken by GTC, as on the same day of the 'sale', the defendants also wrote a letter to GTC as follows:

> We, the Bombay Trading Co Pte Ltd, confirm that at your request payment of the sum of US$3.94m or any such figure to be mutually agreed between you and MS Soon Hua Seng may be made by you to Soon Hua Seng. The acceptance of this payment shall be a good and sufficient discharge of our contract but without prejudice to our legal rights in our contract with Soon Hua Seng.
>
> This confirmation is subject to your furnishing us authenticated evidence of payment made to Soon Hua Seng.

In consequence of the sum of US$3,766,500 received from GTC, the plaintiffs amended their statement of claim on 3 July 1989 to claim the reduced sum of US$188,325

being the difference between the invoice value of the said goods and the amount received from GTC.

Before the assistant registrar, two issues were canvassed by counsel for the parties: (i) whether the defendants were in breach of contract in nominating a ship which refused to take on the full consignment of 14,250 metric tons of bagged rice, and (ii) whether the defendants had agreed to accept a late tender of the documents. The assistant registrar gave judgment to the plaintiffs.

On appeal before me, the defendants addressed me on the same issues. His submission on the first issue was that the defendants were not in breach of contract as the Iran Borhan was capable of carrying the full consignment of 14,250 metric tons of bagged rice as the same ship had on 9 October 1987 carried a shipment of 14,250 tons (net) of rice packed in 285,000 kg bags from Kohshichang to Iran, a fact which was known to the plaintiffs. Counsel for the plaintiffs did not dispute this fact but contended that this was irrelevant as the Iran Borhan, due to constraint of shipping space, could only load 13,950 metric tons of the contracted commodity at the relevant dates.

It is common ground that 300 metric tons of the bagged rice were shut out from the vessel by the master of the vessel because of a lack of cargo space. The evidence showed that commencing from 26 January 1989, the plaintiffs kept the defendants full informed of the progress of loading (which took place at Bangkok and Kohshichang) and on completion of loading on 8 February 1989 informed them that they had loaded 279,000 bags in bags of 50 kg net weight, and requested that the HB L/C be amended to reflect 13,950 metric tons net. It would appear that the shut out had occurred after loading had begun. The defendants did not at that stage object to the *fact* of short shipment as on 13 February 1989 they informed the plaintiffs that they had telexed Iran for the relevant amendment to the BM L/C. They only objected to the short shipment as a *discrepancy* in the documents for the purpose of negotiation under the HB L/C at a much later date after they had failed to obtain the requisite amendment to the BM L/C.

Neither counsel cited any authority in support of his case. It is established law that in a FOB contract, the buyer has the duty to provide a vessel at the appointed time and placed to enable the seller to bring the goods alongside for loading so as to enable the buyer to receive them within the appointed time. This must mean a duty to nominate a ship that is ready, willing and able to load the contracted goods and not merely any ship which is capable of, but for some reason, is not ready, willing or able to do so. Otherwise, a buyer who intends to default will simply nominate an unsuitable ship to make sure that the seller cannot ship the full amount of the contracted goods and then claim that the seller is in breach.

I was therefore of the view that the defendants were in breach of contract in failing to nominate a vessel which was ready, willing and able to take on the 14,250 metric tons of bagged rice.

In view of the defendants' breach, the plaintiffs could have refused to ship the whole or any part of the contracted quantity of rice. However, the evidence showed that this would have entailed great inconvenience to the plaintiffs as all the bags which had already been loaded on board the Iran Borhan would have to be discharged. It would appear that the plaintiffs decided to take a commercial risk to ship what was loaded and to regularize the discrepancy in the shipment by seeking an amendment to the HB L/C. Unfortunately, the risk crystallized into a potential loss when the defendants did not amend the HB L/C and at the same time GTC wrongfully converted the said goods when they arrived in Iran.

Counsel for the defendants contended that the plaintiffs were in breach of contract in failing to ship the whole of the contracted quantity of rice. I agreed that every contract for a quantity of goods is prima facie an entire contract: see 47 *Halsbury's Laws of England* (4th Ed), para 766 n 1. However, the rule does not apply in the present case as the plaintiffs had no obligation to ship any rice to the defendants on account of the defendants' breach of contract in failing to nominate a suitable vessel. After the said goods had been loaded on the Iran Borhan, the defendants had the choice of accepting the said goods, in which event they must pay for them, irrespective of whether the HB L/C was amended, or continue to be in breach. Conversely, the plaintiffs had the choice of selling the said goods in the open market and claiming any deficiency as damages against the defendants for breach of contract, or tendering the said goods as performance under the contract of sale.

On the evidence, the plaintiffs decided to tender the said shipment as due performance by requesting for an amendment to the HB L/C. Thus, what it came to was this: if the defendants did not accept the said shipment as due performance, they themselves would continue to be in breach and were liable to pay damages to the plaintiffs. If they accepted the partial shipment, they were liable to pay the full commercial invoice value, notwithstanding that the plaintiffs were unable to negotiate the bills of lading without the consent of the defendants. If it were the former case, the plaintiffs had mitigated their loss by selling the said goods to GTC direct at a price which was approved by the defendants.

In my view, the plaintiffs' claim against the defendants must succeed on either one or the other of the said causes of action. On either claim, the loss suffered by the plaintiffs is the same.

As regards the second issue as to whether the defendants had waived the tender of the documents out of time, it is an issue of fact which cannot be resolved in these proceedings. It would involve a determination, inter alia, of the effect of the conduct of the defendants in (i) failing to reject the shipment promptly, (ii) applying to GTC to amend the BM L/C, (iii) requesting the plaintiffs to send the shipping documents to Habib Bank, and finally (iv) approving GTC's payment under the BM L/C for the said goods.

For the above reasons, the defendants' appeal was dismissed with costs.

Appeal dismissed.

Solicitors: *Belinda Ang; S Bala & Associates.*

Reported by *Terence Tan Bian Chye*

Ho Mun-Tuke Don & Anor (Liquidators of City Securities Pte) v Oslo Finans AS

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 607 OF 1987
THEAN J
29 MARCH 1990

Companies and Corporations — Preference — Securities company in liquidation — Fraudulent and voidable preference — Whether transfer of client's money from trust account prior to liquidation was with a view to preferring over other creditors — Companies Act (Cap 50, 1985 Ed), s 329

Words and Phrases — 'View' — Bankruptcy Act (Cap 20, 1985 Ed), s 53(1)

CS Pte was a company of stockbrokers and dealers in securities. In June 1985, the defendant placed $1m with CS Pte for investment in the Singapore and Malaysian stock markets.

In February 1986, CS Pte was in financial difficulties and appointed a public accountant firm, PMM, to provide assistance in the management, administration and custody of scrips. PMM were authorized to open an 'escrow account' with TL Bank to receive proceeds from delivery of scrips, collection of receivables and disposal of CS Pte's assets.

On 31 March 1986, CS Pte entered into a 'standstill agreement' with 18 financial institutions which agreed to withhold enforcement of rights against CS Pte, principally for the purpose of preserving and protecting the assets of CS Pte for the benefit of the financial institutions. On 29 April 1986, CWT, a director of CS Pte, instructed one FC of the accountants PMM to open a trust account with a non-creditor bank BOC and to transfer into those accounts the amounts of $121,587.64 and $43,720 which belonged to the defendant and one RS, which were deposited with CS Pte in the TL Bank account. Subsequently, the defendant's moneys were again transferred on 14 May 1986 to SL Finance Ltd which bore interest for the deposits. From 26 May 1986 to 1 August 1986, CS Pte on instructions from the defendant purchased various shares in four lots from moneys in the SL Finance Ltd account.

On 3 July 1986, a winding-up petition was presented against CS Pte and on 4 July 1986, provisional liquidators were appointed. On 31 October 1986, a winding-up order was made against CS Pte and the plaintiffs were appointed liquidators. The shares were handed to the defendant partly by the plaintiffs and partly by CWT, but without the plaintiffs' knowledge that they were bought with the money from the SL Finance Ltd account. The balance sum of $69,310.19 remained in the SL Finance Ltd account. The plaintiffs claimed this balance amount and interest and the return of the shares from the defendant, but the latter point was not argued on appeal.

The plaintiffs argued that the sum of $121,587.64 transferred from the escrow account of CS Pte with TL Bank to the BOC trust account was made within three months prior to commencement of liquidation of CS Pte and was done so with a view to giving the defendant preference over the other creditors of CS Pte and was therefore void under s 53(1) of the Bankruptcy Act (Cap 20, 1985 Ed) applicable by virtue of s 329 of the Companies Act (Cap 50, 1985 Ed).

The defendant asked for an order that it was entitled to the balance standing in the SL Finance Ltd account and retention of the shares. The assistant registrar held in favour of the defendant in respect of both the moneys and the shares stating that the defendant was entitled to keep both. The plaintiffs appealed only in respect of the order for return of the moneys.

Held, dismissing the plaintiffs' appeal:

(1) The burden was on the plaintiffs to prove that the payment or transfer was made with a view to giving a preference to the defendant over the other creditors of CS Pte and the word 'view' was synonymous with 'intention' or 'object'.

(2) The main fact that at the material time the SL Finance Ltd account was set up and the transfer of money into it was effected per se could not give rise to an inference that the dominant intention of CS Pte was to give preference to the defendant over other creditors and such intention could not be inferred from the facts.

(3) There was no direct evidence both oral or documentary that the setting up of the trust account with BOC and transfer of funds to that account were effected with the dominant or principal intention on CS Pte's part to prefer the defendant over the other creditors.

Cases referred to

1 *Re Cutts (A Bankrupt), ex p Bognor Mutual Building* v *Trustee of TW Cutts* [1956] 1 WLR 728 (folld)
2 *Sharp (Official Receiver)* v *Jackson & Ors* [1899] AC 419 (folld)
3 *Sir William Henry Peat* v *Gresham Trust Ltd* [1934] AC 252 (folld)

Legislation referred to

Bankruptcy Act (Cap 20, 1985 Ed) s 53(1)
Companies Act (Cap 50, 1985 Ed) s 329
Securities Industry Act (No 17 of 1973) s 37

Rajah Chelva Retnam for the appellants/plaintiffs.
Chan Kok Chye for the respondent/defendant.

Cur Adv Vult